

**United States Department of Labor  
Board of Alien Labor Certification Appeals  
Washington, D.C. 20001**

Date: January 30, 1998

Case No. **97 INA 071**

In the Matter of:

**OTIS SPUNKMEYER COOKIES, INC.,**  
Employer

on behalf of

**LEY NGOR TEE,**  
Alien

Appearance: R. P. Gaffney, Esq., of San Francisco, California

Before : Huddleston, Lawson, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of LEY NGOR TEE (Alien) by OTIS SPUNKMEYER COOKIES, INC., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U. S. C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at San Francisco, California, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

*Statutory Authority.* Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General (1) that there are not sufficient workers who are able, willing, qualified, and available at the place

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

where the alien is to perform such labor at the time of the application; and (2) that the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.<sup>2</sup>

## STATEMENT OF THE CASE

The Employer, which is engaged in the manufacture and wholesale merchandising of cookie dough, applied for labor certification on behalf of the Alien on February 24, 1994, to fill the position of Financial Reporting Supervisor. This job was classified under the DOT as an Accountant, Budget, under Occupational Code No. 160.162-022.<sup>3</sup> The Employer stated the duties of the Job to be Performed as follows:<sup>4</sup>

Supervise and train accountants for main company (Otis Spunkmeyer, Inc.) & subsidiaries (Triple 8 , Victory Lap, Sweet Happenings, Peter James & Otis-Europe); develop in-house training curricula for company-wide accounting staff; administer company's accounting policies & recommend and implement improvements to same; prepare budget and cost control analyses, projection and profitability studies and breakeven analyses for each product line; interface with independent audit firm; provide timely & accurate reporting to Chief Financial Officer; perform special project at request of Chief Financial Officer and other department heads.<sup>5</sup>

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>3</sup>**160.162-022 ACCOUNTANT, BUDGET** (profess. & kin.) Applies principles of accounting to analyze past and present financial operations and estimates future revenues and expenditures to prepare budget: Analyzes records of present and past operations, trends and costs, estimated and realized revenues, administrative commitments, and obligations incurred to project future revenues and expenses, using computer. Documents revenues and expenditures expected and submits to management. Maintains budgeting systems which provide control of expenditures made to carry out activities, such as advertising and marketing, production, maintenance, or to project activities, such as construction of buildings. Advises management on matters, such as effective use of resources and assumptions underlying budget forecasts. Interprets budgets to management. May develop and install manual or computer-based budgeting system. May assist in financial analysis of legislative projects to develop capital improvement budget and be designated Program Analyst (government ser.). May assist communities to develop budget and efficient use of funds and be designated Public Finance Specialist (government ser.) GOE: 11.06.01 STRENGTH: S GED: R5 M5 L5 SVP: 8 DLU: 89

<sup>4</sup>Verbatim quotation of Employer's application, part 13 of ETA 750, without alteration of spelling or punctuation.

<sup>5</sup>In support of its application the Employer said, "Although our company does not have an accounting position titled 'Accounting Manager,'" the responsibilities of the position align with the duties of the traditional position of an Accounting

In stating the minimum education, training and experience to perform satisfactorily the job duties described above, Employer required a baccalaureate degree in accounting and three years' experience in the Job Offered, and "post secondary course work or job experience in education or occupational training." The Employer's Other Special Requirements were that a job candidate (1) "must have passed all four parts of the California C.P.A. Exam;" (2) have "Minimum 2 yr. experience Management Accounting in the snack food industry;" (3) have "Prior experience in cost accounting and preparation of consolidated financial statements and cashflow reports;" (4) have "Thorough knowledge of factors affecting sales volume, cost and profitability in the snack food industry." The worker would report to the Chief Financial Officer and would supervise eleven employees. AF 50. Employer's advertisement produced the resumes of two applicants, one of whom Employer considered unqualified following an interview, while the other was not reached and was not interviewed.<sup>6</sup>

**Notice of Findings.** The Notice of Findings (NOF) of March 28, 1996, advised Employer that the Certifying Officer would deny certification, subject to rebuttal. AF 43-45. (1) Based on 20 CFR § 656.21(b)(5), the CO said the Employer's requirement of three years of experience in the job or in accounting did not appear to meet its true minimum requirements, as Alien did not meet the job requirements stated in the application when she was first hired, and the Employer trained the Alien or provided the necessary learning opportunities while she was employed on this job. AF 44. (2) Citing 20 CFR §§ 656.21(b)(6) and 656.21(j)(1) (iii) and (iv), the CO found that the Employer rejected a U. S. job candidate, Ms. Lee, for reasons that were neither lawful nor job-related. The CO observed that after the State Job Service sent Employer the resume of Mr. Tate, a qualified applicant, on April 27th, the Employer did not attempt to reach him until May 16th, a date three weeks later. Because the persuasive evidence of record supported a finding that the Employer did not make an effort to reach this applicant on a date "as early as possible," as directed, the CO found that recruitment of U. S. candidates was tardy and incomplete. AF 45. The CO then described the evidence needed to determine the issues raised in this matter and the CO directed the Employer to file a rebuttal to the NOF on or before May 2, 1996.

**Rebuttal.** Employer's Rebuttal consisted of a arguments by Employer's counsel, a statement by its Corporate Controller, and exhibits that included organization charts Nos. 1-3, and a sheet showing telephone calls made on May 10, 1995. AF 28-42. While the Alien met the job qualifications whose lack was the basis for the rejection of Ms. Lee, the Employer argued that

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Manager." AF 89.

<sup>6</sup>The Alien has a baccalaureate degree in Business Administration and Accounting from the California State University following studies between January 1986 and December 1988; earlier she had received a "certificate" in Education after two years of study at a Malayasian teacher training college. From October 1989 to June 1992 the Alien worked for the Employer as an Account Information Analyst; from June 1992 to December 1992 she worked for the Employer as a Senior Accountant; from her promotion in December 1992 to February 1994, the date of application, she worked for the Employer in the position at issue as a "Financial Reporting Supervisor." AF 90, 108-109.

she had gained the requisite experience in positions that were not similar to the job at issue.

Employer contended that its application did represent its true minimum requirements for this reason, and that it rejected Ms. Lee for reasons that were lawful and job-related. Relying on the Board's holding in **Delitizer Corp.**, 88 INA 482 (1990)(*en banc*), the Employer argued that after she was hired, the Alien had acquired the requisite qualifications while working in one or more positions that were different from the job its application described. In describing her career in this firm, the Employer said that it created a job that it called "Financial Reporting Supervisor" as a new position to which it promoted the Alien from her job as a Senior Accountant. Employer argued that the entry level "Practical Trainee/Account Information Analyst" position in which Alien gained her three years of accounting experience was materially different from the Financial Reporting Supervisor job it offered in this application.<sup>7</sup> The Employer concluded that, "Rather than emerging as part of a normal career progression for [the Alien], the creation of the position of Financial Reporting Supervisor was actually growth-driven, with the position evolving as a downward delegation of job tasks which were formerly assumed by the Controller." AF 36.

**Final Determination.** On July 16, 1996, the CO issued the Final Determination in which certification was denied on grounds that the Employer failed to rebut the NOF findings.

(1) Employer failed to state its true minimum requirements, since it initially hired the Alien without the special job requirements noted above. While Employer rebutted on grounds that the Alien was a trainee in a different job in a different part of its organization, it admitted that the financial records system where she first worked had been consolidated as business volume increased. Based on the evidence of record, the CO held that Employer did provide the Alien an opportunity to gain the special experience it now requires of the U. S. workers, who could not gain the same experience except under very limited circumstances. The CO added that the Employer had not offered to train otherwise qualified job applicants in specialized "factors affecting sales volume, cost, and profitability in the snack food industry" that it said were essential to qualification for the position offered. For these reasons, the CO concluded that the job specifications were inconsistent with the regulations cited in the NOF.

(2) In the context of the Employer's rejection of Ms Lee on grounds that she did not have experience in the snack food industry, the CO rejected this criterion on grounds that it did not meet the Employer's actual minimum requirements for the satisfactory performance of the job duties. The CO concluded that the Employer had failed to sustain its burden of proving that its reasons for rejecting the U. S. workers who applied for this position were lawful and job related under the Act and regulations.

**Appeal.** On August 19, 1995, the Employer moved for reconsideration of the denial of

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<sup>7</sup>Employer said, "Principal among the duties of the Financial Reporting Supervisor at [the] time the position was created was to take lead responsibility for the computer conversion within the accounting department, set up the financial reporting system and standardize the accounting policies for all the companies in the U. S. and abroad." AF 34.

certification and BALCA review, citing **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988). When the CO denied the motion on July 16, 1996, the Employer again requested review on December 30, 1996, when it filed the brief that the panel considered in deciding this appeal.<sup>8</sup>

## DISCUSSION

The Employer's reasons for appeal are (1) that the CO failed to discuss the arguments set forth in its rebuttal, and (2) that the Final Determination should be reversed because it raised issues not raised in the NOF.

Employer's primary argument on appeal is that the CO failed to discuss the arguments it set forth in the Rebuttal. As the Employer did not contest the CO's statement that the entire record was considered in reaching a finding, Employer's gravamen on appeal is that the Final Determination did not discuss or apply the facts found to the cases Employer cited as precedents in the interpretation of its evidence under 20 CFR § 656.21(b) (6).<sup>9</sup> The Employer sought reversal, observing that where an employer's rebuttal is persuasive, reversal may be warranted.<sup>10</sup>

**Delitzer.** The issues underlying the Employer's rebuttal and appeal arose from its admission that the Alien gained the requi-site job experience while working for the Employer. Even though Employer gave the Alien training for the position and rejected U. S. candidates as unqualified for this job without offering them equivalent training, however, it contends that its rejection of U. S. candidates did not violate 20 CFR § 656.21(b)(6) because Alien's prior job duties were sufficiently dissimilar from the job offered, citing the holding in **Delitzer Corp., of Newton**, 88 INA 482 (May 9, 1990).

Noting that the employer must sustain the burden of proving the dissimilarity between the position at issue and the jobs where the alien had acquired the level of experience required, the Board commented in **Delitzer** that, "While the standard itself is straight forward, ambiguities may exist concerning the application of the standard." In **Delitzer** the Board expressly rejected the

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<sup>8</sup>The new evidence added in the Employer's Appeal cannot be considered under 20 CFR §§ 656.24(b)(4), 656.27(c). **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992). After noting the letter by Morlock, who was the incumbent Chief Financial Officer when it was signed on December 27, 1996, however, we find that his assertions added nothing that required comment.

<sup>9</sup>In arguing this contention, Employer cited and discussed **H. P. Laboratories**, 91 INA 087 (Mar. 12, 1992); **E & C Precision Fabricating, Inc.**, 89 INA 249 (Nov. 21, 1991); **Barbara Harris**, 88 INA 392 (Apr. 5, 1989); and **Gencorp**, 87 INA 659 (Jan. 13, 1988). Employer also cited holdings but did not discuss **Dr. Mary Zumont**, 89 INA 035 (Nov. 4, 1991); **Houston Graduate School of Theology**, 90 INA 491 (Dec. 6, 1991); **Serve Fashion, Inc.**, 90 INA 027 (Dec. 7, 1990). It also cited **CSU, Stanislaus**, 90 INA 506 (Oct. 7, 1991); **Garland Community Hospital**, 88 INA 217 (Jun. 20, 1991); **Chico Arts**, 89 INA 342 (May 15, 1991); **Cinecom International Films**, 90 INA 041 (Apr. 8, 1991); **Jason's Restaurant**, 88 INA 058 (Jul. 12, 1988).

<sup>10</sup>Employer cited **Advanced Micro Devices, Inc.**, 89 INA 306 (Dec. 12, 1990); **Duarte Gallery, Inc.**, 88 INA 092 (Oct. 11, 1989); **Solomon Adam Dahni**, 88 INA 391 (Jul. 3, 1989); **Quincy School Community Council**, 88 INA 081 (Feb. 21, 1989)(*en banc*); **Allied Towing Service**, 88 INA 046 (Jan. 9, 1989)(*en banc*).

argument that analysis of similarity should be limited to a comparison of the job duties, observing that, "Two jobs may have separate identities (and DOT codes), but still be considered sufficiently similar under section 656.21(b)(6)." "Thus," the Board added, "while a comparison of the job duties is certainly a relevant consideration, we are not persuaded that this should be the sole consideration."<sup>11</sup> After a detailed discussion of its reasons, the Board said,

Recognizing that a consideration of these various factors will offer Certifying Officers broad discretion in determining the similarity or dissimilarity of positions, we hold that Certifying Officers, in making such determinations must clearly state those factors [that were] included as a basis for their decisions. It must be remembered, however, the employer bears the ultimate burden of proof to demonstrate that the positions are dissimilar.

At this point the Board reaffirmed the principle that where the required experience was gained by an alien while working for the employer in jobs other than the job offered, an employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification, observing that,

Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.<sup>12</sup>

The CO discussed the **Delitzer** criteria for the benefit of the Employer in the NOF and said,

If you contend the jobs are dissimilar, documentation addressing the following factors is required: the positions of the jobs in your hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the relative job duties and supervisory responsibilities, your prior employment practices regarding the relative

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<sup>11</sup>Analyzing recent panel decisions, the Board discussed with approval the emphasis placed on the fact that an employer customarily hired employees with the qualifications now required of U. S. applicants in **Duthie Electronic Corp.**, 88 INA 216 (Nov. 30, 1989). It noted that the positions were found dissimilar in **Eimco Process Equipment Co.**, 88 INA 216 (Aug. 4, 1989), where the employer demonstrated a long history of recruiting and hiring using the same minimum qualifications it now required.

<sup>12</sup>The recent panel decisions under **Delitzer** have implemented the Board's holding and have affirmed the decisions of the Certifying Officers who reviewed all available evidence and extended their determinations beyond a mere comparison of job duties. See **Advanced Computer Concepts**, 95 INA 313 (Mar. 4, 1997); **Oleen & Associates, Inc.**, 94 INA 315 (Jun. 16, 1995); **Bankers Trust Company**, 93 INA 486 (Nov. 16, 1994); **Chilcote, Inc.**, (90 INA 099); **Carrillo's Mexican Restaurant**, 90 INA 098 (Feb. 28, 1991).

positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

AF 45. The Rebuttal offered evidence in response to some but not all of these requests, which obviously were directed toward the **Delitzer** criteria. As Employer's Rebuttal appeared to comply with many of the CO's instructions and certification was denied, Employer's appeal should otherwise have been addressed to findings of fact in the Final Determination. Because Employer complained only of the defective Final Determination, however, the adequacy of those findings must be considered, as the Board expressly held in **Delitzer** that the CO must clearly state the supporting factors that were considered in reaching a conclusion.

**Conclusion.** After considering the arguments in Employer's brief, we examined the evidence of record, Employer's application for alien labor certification, the NOF, Employer's Rebuttal, and the CO's Final Determination in order to determine whether the Employer's grievance on appeal is meritorious. If the CO's statement of the reasons for denying certification is defective, the Employer's entitlement to certification cannot be reached at this point in the proceeding. In this case the Final Determination simply stated the CO's conclusions without reporting the findings of such subordinate facts as the panel needs to decide whether or not the evidence was sufficient to support the conclusion that the Employer failed to sustain its burden of proof under 20 CFR § 656.21(b)(6).<sup>13</sup> Consequently, we find that in the exercise of her broad discretion the Final Determination the CO did not state sufficient findings to support a decision as to whether Alien's prior job with Employer and the position Employer offered were similar or dissimilar. Since the NOF and Rebuttal are complete and adequate for the disposition of this application, the file must be returned to permit the CO to make appropriate findings of subordinate fact in the Final Determination to support the CO's denial of certification.

Accordingly, the following order will enter.

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<sup>13</sup>As the Final Determination observed, the CO's disposition of the first issue significantly affected the analysis of Employer's response to NOF directions based on 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv), which were addressed to the Employer's rejection of the U. S. worker. AF 45-46.

## **ORDER**

1. The Certifying Officer's denial of labor certification is hereby vacated subject to further proceedings in accordance with the foregoing decision.

2. This application for alien labor certification and the record referred by the Certifying Officer to this Board is hereby remanded to the Certifying Officer for the reconsideration of the evidence and the issuance of a Final Determination to remedy the deficiencies discussed hereinabove.

For the Panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.



